

FEB 27 2006

**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

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SENSITIVE

MUR: 5595
DATE COMPLAINT FILED: November 1, 2004
DATE OF NOTIFICATION: November 8, 2004
LAST RESPONSE RECEIVED: December 30, 2004
DATE ACTIVATED: October 13, 2005

EXPIRATION OF SOL: October 26, 2009

COMPLAINANT: Jennifer L. Messer

RESPONDENTS: World Class Gun Shows, Inc.
Clear Channel Communications, Inc./WFBQ Radio

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. §441b(a) and (b)(2)
2 U.S.C. §441d(a)(3)
2 U.S.C. §434(f)(3)
11 C.F.R. §100.29(b)(2)
11 C.F.R. §110.11

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The complainant alleges that on October 26, 2004, "exactly one week before the Presidential election," she heard an advertisement on Indianapolis radio station WFBQ for the upcoming Indy 1500 Gun and Knife Show. According to the complaint, the advertisement referenced a "Kerry permit," but did not contain the requisite disclaimer. The "Indy 1500 Gun and Knife Show" ("Gun Show"), is sponsored by World Class Gun Shows, Inc. ("World Class"),

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1 an Oklahoma corporation. The Gun Show took place on October 29, 30, and 31, 2004, as one of
2 World Class's five annual shows in Indianapolis.¹

3 World Class's response to the complaint states that the advertisement was not an
4 electioneering communication that required a disclaimer because the advertisement referenced a
5 "carry permit," a license to carry a handgun, not a clearly identified federal candidate. Likewise,
6 disclaiming liability because it did not sponsor the advertisement, Clear Channel
7 Communications, Inc./WFBQ Radio ("WFBQ") in its response maintains that no disclaimer was
8 needed because "[t]he context of the advertisement... suggests the reference could just as fairly
9 be interpreted to be a carry permit, which is a license issued by the government to a citizen
10 authorizing him to carry a firearm." WFBQ Response at 2.

11 As discussed in more detail below, this Office recommends that the Commission find
12 reason to believe that World Class violated the corporate contribution and disclaimer provisions
13 of the Federal Election Campaign Act of 1971, as amended (the "Act"), and authorize an
14 investigation to discover the costs of the advertisement. This Office further recommends that the
15 Commission find no reason to believe that WFBQ violated the disclaimer provisions of the Act
16 and close the file as to this respondent.

17 **II. FACTUAL BACKGROUND**

18 The complainant alleges that she heard the name "Kerry" used in an advertisement for the
19 Gun Show on October 26, 2004, and she believed the word "Kerry" referred to the 2004
20 Democratic presidential candidate, John Kerry. Specifically, she alleges that the advertisement
21 had a male voice speaking to his friend, "Harvey." At the end of the advertisement, she states,
22 the male voice said, "What's that, Harvey? You say some tall, slick guy, wearin' a pair of flip-

¹ World Class has been in business for nineteen years, and besides sponsoring five shows annually in Indiana, also sponsors three gun shows per year in Oklahoma City

1 flops said you had to register your guns? Then he took them from you and you never saw them
2 again? No Harvey, you just got the new Kerry Permit.”

3 World Class, the advertisement's sponsor, maintains that the advertisement said “carry
4 permit,” not “Kerry permit.” According to World Class, it is common to use the term “carry
5 permit” in gun show commercials to remind attendees to bring their carry permits with them.
6 World Class Response at 3.²

7 WFBQ, which ran the advertisement, provided an audio copy (as did World Class), and
8 stated that it had never received a transcript of the advertisement, which is a customary practice
9 at WFBQ. According to WFBQ's response, the advertisement is a parody of Jimmy Stewart
10 talking to Harvey the rabbit in the movie *Harvey*. This is a transcript of the full advertisement
11 prepared by listening to the audio version:

12 Yeap Harv, I love it out here in the woods. Don't forget we have to get back
13 for this weekend's big Indy 1500 Gun and Knife Show out at the State
14 Fairgrounds. We'll have to allow more time because it's in two big buildings
15 cause there's twice as much to see. What's that Harv? When are we going
16 to hunt buffalo? Well that's the reason we came out here so we can hunt the
17 great bison with all the gear we got at the last Indy 1500. Gun and custom
18 skinning knives, spot and scopes, custom loads and rifles... everything for a
19 great hunt. Harv, go over the hill. I think I heard one. Yep folks, Harv may
20 need all those high powered guns and ammo but all I need for ole' baby is just
21 one bullit. Harv what's the matter with you? Why are you so upset? Slow down.
22 You say a slick talkin' guy, wearin' flip flops came up to you before you could
23 shoot? He told you you needed to register your guns and then he'd give 'em back?
24 What? You never saw him or your guns again? You think you got buffaloed?
25 No Harv. You got the new *Kerry/carry* permit. Celebrity voice and imaginary
26 character voice impersonated. The Indy 1500 Gun, Knife, and Outdoor Show
27 this Friday, Saturday, and Sunday at the State Fairground.
28
29

² World Class's response also included two affidavits. The first is from Russel W. Elmore, a self-proclaimed firearm expert in Indiana who states that the Indiana License to Carry a Handgun is generally referred to as a “carry permit.” A second affidavit is provided by World Class's counsel, Bryan Lee Ciyu, stating that the license is known as a carry permit, it would be effectively impossible for World Class to conduct business without referring to a carry permit, and that World Class is a reputable business and is not a political party or organization.

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1 **III. ANALYSIS**

2 **1. Respondent World Class Gun Shows, Inc.**

3 The Act prohibits corporations from financing electioneering communications from their
4 general treasury funds in connection with a federal election. *See* 2 U.S.C. §§ 441b(a) and (b)(2);
5 11 C.F.R. § 114.2(b)(2)(iii). Electioneering communications include broadcast, cable or satellite
6 communications that refer to a clearly identified Federal candidate and are publicly distributed
7 within 60 days before a general election. *See* 2 U.S.C. § 434(f)(3)(A)(i). For Presidential
8 candidates, “publicly distributed,” as applicable to this matter, means the electioneering
9 communication is disseminated through the facilities of a radio station, and that it can be
10 received anywhere in the United States before the general election.
11 *See* 11 C.F.R. § 100.29(a)(3)(b)(3)(i).

12 Because the advertisement aired on radio in Indianapolis on October 26, 2004, within
13 sixty days prior to the general election in which John Kerry was a candidate for the office of
14 President, the only question is whether it “refers to a clearly identified Federal candidate.” We
15 conclude it does. As discussed below, the use of the word “Kerry” was an unambiguous pun that
16 intentionally played on the similar sounding words “Kerry” and “carry.”

17 Section 431(18) of the Act states, in pertinent part, that the term “clearly identified”
18 means that “the name of the candidate involved appears.” Commission regulations define “refers
19 to clearly identified candidate” in the electioneering communication context to mean, *inter alia*,
20 that the candidate’s “name, nickname, photograph, or drawing appears, or the identity of the
21 candidate is otherwise apparent through an unambiguous reference[.]” 11 C.F.R. § 100.29(b)(2).
22 World Class’s response claims that the advertisement did not clearly identify the candidate

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1 because it did not refer to the candidate fully or by an unambiguous label. *See* World Class
2 Response at 4.

3 To the contrary, the advertisement contains the name "Kerry," or at least an unambiguous
4 reference to Senator Kerry, within the phrase "Kerry permit." The notion that the disputed
5 phrase said "carry permit" renders the advertisement into nonsense. If Harv had just received a
6 new "carry permit" he would have received a license to carry firearms, and his guns would not
7 have been taken from him. Thus, the response, "No Harv, you just got the new carry permit"
8 after the "slick-talkin' guy" takes Harv's guns would not make sense. However, the statement
9 makes sense as "Kerry permit" because that would convey the perception that Presidential
10 candidate John Kerry might limit the rights of gun owners. If World Class wanted to remind
11 listeners to bring their carry permits, presumably it would have explicitly done so in the
12 informational sections of the advertisement. Moreover, the advertisement ran less than one week
13 before the general election and included the imagery of a "slick talkin' guy wearin' flip flops" --
14 a reference to the charge that Kerry was a "flip flopper" on issues. What is heard simply cannot
15 be, in context, the simple word "carry" as claimed by World Class. Consequently, the
16 advertisement "clearly identifies" Senator Kerry within the meaning of 11 C.F.R. § 100.29(b)(2),
17 and is therefore an electioneering communication within the meaning of 2 U.S.C.
18 § 434(f)(3)(A)(i).

19 Because we conclude the advertisement is an electioneering communication, we
20 recommend that the Commission find reason to believe that World Class Gun Shows, Inc.
21 violated 2 U.S.C. § 441b(b)(2) by financing it. Further, since all electioneering communications
22 by any person require an appropriate disclaimer, 2 U.S.C. § 441d(a), we recommend that the
23 Commission find reason to believe that World Class Gun Shows, Inc. violated 2 U.S.C.

§ 441d(a)(3) because the advertisement did not clearly state the name, address, telephone number or World Wide Web address of the person who paid for the communication nor indicate whether the communication was authorized by any candidate or candidate's authorized committee.

2. Respondent Clear Channel Communications/WFBQ Radio

WFBQ's response disclaims liability because the radio station did not sponsor or pay for the advertisement, but merely ran it for a fee paid by World Class, a regular gun show advertiser for about ten years. Included with WFBQ's response is an affidavit by WFBQ's General Manager, Christopher Wheat, who avers: "WFBQ charged WCGS [World Class] a usual and customary rate for the advertising." Wheat Aff. at ¶4.

Radio stations that broadcast paid advertising do not make "contributions" or "expenditures" as long as the sponsors pay the prevailing commercially reasonable rate. See Advisory Opinion 2005-18 (Reyes). As set forth *supra*, WFBQ stated that it charged the "usual and customary rate for the advertising," and we have no contrary information. Therefore, by running the advertisement, WFBQ did not violate the federal election laws.

Accordingly, this Office recommends that the Commission find no reason to believe that Clear Channel Communications/WFBQ Radio violated the Act or Commission regulations and close the file as to this respondent.

IV. PROPOSED DISCOVERY

This Office plans to conduct a limited investigation to identify World Class's costs in preparing and disseminating the radio advertisement in issue and any of its other broadcast advertisements during the 2004 electioneering periods that also identified John Kerry.

V. RECOMMENDATIONS

1. Find reason to believe that World Class Gun Shows, Inc. violated 2 U.S.C. §§ 441b(a) and 441d(a)(3).
2. Find no reason to believe Clear Channel Communications/WFBQ Radio violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations, and close the file as to this respondent.
- 3.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.

Date

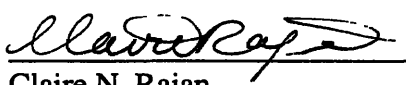
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BY:


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Attachment:

Factual and Legal Analysis for World Class Gun Shows, Inc.